The Holladay Corporation *and* International Union of Operating Engineers, Local 99-99A, AFL-CIO, Petitioner. Case 5-RC-11851

April 15, 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

Pursuant to a Stipulation for Certification Upon Consent Election executed by the parties, and approved by the Regional Director for Region 5 of the National Labor Relations Board on September 14, 1982, an election by secret ballot was conducted on October 15, 1982, among the employees in the stipulated unit. Upon conclusion of the balloting, the parties were furnished with a tally of ballots which shows that, of approximately 7 eligible voters, 7 cast ballots, of which 4 were for, and 3 against, the Petitioner; there were no challenged ballots. Thereafter, the Employer filed timely objections to conduct affecting the results of the election.

In accordance with the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Regional Director for Region 5 conducted an investigation and, on November 23, 1982, issued and duly served on the parties his Report on Objections. In his report, the Regional Director recommended that the Employer's objections and its postelection challenge to the ballot of employee Jose Luis Huezo be overruled. Thereafter, the Employer filed timely exceptions to the Regional Director's report and a supporting brief, and the Petitioner filed a brief in response to th exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the National Labor Relations Act, as amended, and it will effectuate the purposes of the act to assert jurisdiction herein.

2. The Petitioner is a labor organization claiming to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The parties have stipulated, and we find, that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All engineers and maintenance employees employed by the Employer at 4850 Connecticut Avenue, N.W., Washington, D.C.; excluding all office clerical employees, professional employees, the chief engineer, guards and supervisors as defined in the Act.

5. The Board has considered the Regional Director's report, the Employer's exceptions and the parties' briefs, and the entire record in this case, and hereby adopts the Regional Director's findings and recommendations to the extent consistent herewith.[1]

The Employer generally alleged in its Objections 2 and 3 that the Petitioner had interfered with the election by promising certain benefits to those employees who supported its organizing campaign. The Regional Director found that, in support of these objections, the Employer had submitted the affidavit of its vice president, Wallace Holladay, Jr., who stated that, following the election, two *named* employees had told him that during a union meeting on October 13, 1982, the Petitioner's business agent had promised to waive initiation fees for those employees supporting the Petitioner in the election campaign, and had promised the employees that he would place the Petitioner's supporters in higher paying jobs than they presently held in the event no contract was ever reached with the Employer.[2] The Regional Director concluded that this evidence constituted hearsay, and thus it could not be relied on to sustain the objections. He noted that the Employer had not provided any explanation for its failure to offer as witnesses, or to submit the affidavits of, those employees who reported the alleged objectionable conduct to Holladay. Accordingly, the Regional Director recommended that the Employer's Objections 2 and 3 be overruled.

Contrary to the Regional Director, we do not find that in the circumstances of this case Holladay's affidavit can be disregarded solely because of its hearsay nature. It is well settled that, where the objecting party submits *prima facie* evidence demonstrating that an election was not held under the proper laboratory conditions, the Board will not hesitate to commit the necessary investment of time and money to protect its election process.[3] In this case, the Employer has alleged that the Union promised initiation fee waivers and, if circum-

[1] In the absence of exceptions thereto, we adopt, *pro forma*, the Regional Director's recommendations that the Employer's Objections 1 and 5 be overruled.

[2] While not noted by the Regional Director, the business agent also allegedly stated that he had 100 jobs open and at his disposal.

[3] *Newport News Shipbuilding & Dry Dock Co.*, 239 NLRB 82, 83-84 (1978).

stances warranted, higher paying jobs to its supporters. If proved these allegations, particularly as relating to an alleged *Savair* violation,[4] might well warant setting aside the election.

Although the only initial supporting evidence for these objections was Holladay's affidavit, we nevertheless conclude that the Employer has presented sufficient information to warrant a full investigation of the issues raised. The Employer has alleged with specificity the objectionable statements attributed to the Petitioner's representative and the date they occurred. More critically, the Employer has provided the names of two employee witnesses who it claims would substantiate these allegations. As the Board stated in *Cities Service Oil Co.*, 77 NLRB 853, 857 (1948). "[W]e consider as crucial, in making an investigation of preelection interference, that we have names of witnesses upon whom the moving party relies." Thus, by identifying two employees who allegedly received improper inducements to support the Petitioner, the Employer has furnished the kind of evidence necessary for the Region to proceed with a full investigation of the objections. We find that in this situation the Regional Director should have made an effort to interview those persons named by the Employer in considering the merits of the objections' allegations.

We also find, contrary to the Regional Director, that the Employer's failure to submit affidavits signed by the named employees or to provide them as witnesses did not mandate overruling the objections. Since it does not possess any subpoena power at this stage of a representation proceeding, the Employer could have substantiated Holladay's allegations only with the voluntary cooperation of these employees. Indeed, we urge objecting parties to present such evidence whenever possible. However, as the Fifth Circuit pointed out in *Eds-Idab, Inc. v. NLRB*:[5]

> It is apparent that such voluntary cooperation often will be difficult or impossible to obtain. Either an objecting employer or an objecting union might find considerable resistance among employees fearful of alienating their employer or union, in either event fearful of jeopardizing their jobs.

Accordingly, we conclude that, when an objecting party has specifically identified witnesses to corroborate hearsay evidence that supports its objections, such objections may not be overruled by the Regional Director solely on the basis that the objecting party failed to produce such witnesses or their affidavits.

In reaching our determination here, we also distinguish certain prior cases in which the Board has found that the objecting party had not presented sufficient evidence to establish a *prima facie* case supporting its objections.[6] In *Allen Tyler & Son*, 234 NLRB 212 (1978), the Board held that it would not require the Regional Director to conduct an investigation merely on the basis of a "suspicious set of circumstances." By contrast, this Employer has alleged specific conduct by the Petitioner which, if it occurred, may warrant setting aside the election. *Aurora Steel Products*, 240 NLRB 46 (1979), is also inapposite since the employer in that case did not provide the Board with an affidavit citing the names of witnesses who could substantiate its allegation. Finally, in *Howard Johnson Distribution Center*, 242 NLRB 1286 (1979),[7] the Board rejected the argument that the Board agent did not conduct a proper investigation of election objections by allegedly failing to interview certain witnesses and by refusing to wait for the arrival of the employer's primary witness, a management official. In affirming the Board's decision there, the Fifth Circuit pointed out that the employer did not establish how its management officials "could have had personal knowledge of misrepresentations which were alleged to have been made to employees . . . ."[8] That case also is distinguishable from the present case since the Employer here has submitted its vice president's affidavit setting forth precise details of the alleged objectionable conduct and identifying witnesses who allegedly could provide supporting evidence. Futhermore, whereas there was evidence in *Howard Johnson* that the Regional Office had interviewed certain key witnesses that the employer had listed in its objections, the Regional Director in this case appears not to have conducted an investigation.

Accordingly, we conclude that the Regional Director's failure to investigate fully the issues raised in the Employer's Objections 2 and 3 constituted an abuse of his discretion. We therefore shall remand these objections to the Regional Director for a full investigation or a hearing as he deems appropriate. Since the Employer's Objection 4 raises issues that arguably relate to the allegations in Objections 2 and 3 under consideration here, we shall

[4] *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973).

[5] 666 F.2d 971, 975 (5th Cir. 1982).

[6] Member Hunter, who was not on the Board when these cases were decided, does not hereby indicate whether he agrees in any event with the holdings of these cases.

[7] See also *Howard Johnson Distribution Center*, 242 NLRB 1284 (1979).

[8] *NLRB v. Howard Johnson Distribution Center*, 650 F.2d 741, 743 (5th Cir. 1981).

direct the Regional Director to take similar action with respect to this objection.

ORDER

It is hereby ordered that the above-entitled matter be, and it hereby is, remanded to the Regional Director for a supplemental report on the Employer's Objections 2, 3, and 4, which may, at his discretion, be based on a full investigation or a hearing. Such supplemental report on objections shall contain recommendations concerning whether the alleged statements by the Union constitute objectionable conduct warranting the setting aside of the election previously conducted herein.

IT IS FURTHER ORDERED that the Hearing Officer designated for the purpose of conducting any hearing pursuant to this Order shall prepare and cause to be served on the parties a report containing resolutions of credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of said objections. Within 10 days from the date of issuance of such report, either party may file with the Board in Washington, D.C., eight copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof on the other party, and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board will adopt the recommendations of the Hearing Officer.

IT IS FURTHER ORDERED that the above-entitled matter be, and it hereby is, referred to the Regional Director for Region 5 for the purpose of conducting such full investigation or hearing as he may find necessary, and that the said Regional Director be, and hereby is, authorized to issue notice of any such hearing.